No. 15,009

IN THE

United States Court of Appeals

For the Ninth Circuit

In the Matter of Application for Citizenship of:
ALEJO TRABOCO TANO, et al.,
Appellants,

vs.

UNITED STATES IMMIGRATION AND NATURALIZATION DEPARTMENT,
Respondent.

APPELLANTS' CLOSING BRIEF.

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Table of Authorities Cited

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Respondent's reply brief is limited to mere assertions that appellants' position is "obviously" in error, without citation of any authority to illustrate this supposedly obvious error. Respondent's reply brief cites only four cases; two of those cases were cited by appellants in support of contentions made in appellants' opening brief; the third of respondent's four cases is cited to support the text of the Federal Rules of Civil Procedure; and the fourth case, which is the only case cited in support of affirmance of the court below, is of no real help on the issues, as appellants will show.

Respondent's first argument, presented on pages 9 to 12 of respondent's reply brief, is that the savings clause of the 1952 Act does not apply to appellants because (according to respondent) they had no status, condition or rights at the time the 1952 Act took effect. This entire argument is irrelevant and of no consequence because it overlooks the fact that the savings clause of the 1952 Act preserves many things in addition to rights, conditions, and a status: the clause also provides that the 1952 Act shall not affect any "right in process of acquisition, act, thing . . . or matter . . . done or existing, at the time this Act shall take effect . . ."

Appellants rely on this entire provision and particularly contend that the act of each appellant in acquiring sea time in complete or partial fulfillment of the residence requirements of the 1940 Act, was an act, thing or matter which was done and existing at the time the 1952 Act took effect.

At page 10 of respondent's reply brief the bald statement is made that "it is apparent" that the savings clause of the 1952 Act only extends to privileges that could have been pursued but for the enactment of the 1952 Act. No authority is cited for this assertion, and in fact none can be cited. Quite the contrary is true. As discussed at pages 7 and 8 of appellants' opening brief, it is only necessary that acts, things or matters have been *done or existing* at the time the 1952 Act took effect—no requirement of validity is imposed, and no requirement is made that such acts,

things or matters should have been pursuable but for the enactment of the 1952 Act.

The statement is also found at page 10 of respondent's reply brief that "Neither *United States v. Menasche,* 348 U.S. 528 (1955) nor *Zacharias v. Shaughnessy,* 221 F.2d 578 (2d Cir. 1955) are applicable . . . since in both cases the petitioners had an existing legal status at the time the 1952 Act was passed . . ." But the plain facts of those cases demonstrate the complete invalidity of the quoted statement.

In the *Zacharias* case the only things that had occurred prior to the effective date of the 1952 Act were that the alien had entered this country illegally, and his wife had filed an application for an immigration visa for him which was later denied. He admitted that he was at all times deportable. Therefore it is misleading for the respondent to state that Zacharias had "an existing legal status," since that infers that he had some sort of enforceable rights, when in fact he was not eligible for anything (except deportation) when the 1952 Act took effect.

In the *Menasche* case the alien had filed a declaration of intention before 1952, but his petition for naturalization was not filed until after the 1952 Act took effect. The United States there contended that the petition was governed exclusively by Section 405(b) of the 1952 Act, and that this section and Section 316(a) of the 1952 Act 'otherwise specifically provided' for Menasche. Respondent makes the same contention here (on page 8 of respondent's reply brief),

claiming that Section 330(a)(2) of the 1952 Act otherwise specifically provides for appellants. The Supreme Court rejected these contentions in the *Menasche* case (see pages 12 to 16 of appellants' opening brief), and respondent's contention here is similarly groundless. Moreover it should be noted that the court below entered no findings as to whether any section of the 1952 Act otherwise specifically provides for appellants.

At page 10 of respondent's reply brief the assertion is made that *Shomberg v. United States,* 348 U.S. 540, is "more pertinent to the instant case." But the *Shomberg* case is readily distinguishable from the case at bar. That case turned upon an interpretation of Section 318 of the 1952 Act, and Section 318 played a role in the *Shomberg* case analogous to Section 330(a)(2) in the case at bar. Here respondent claims that Section 330(a)(2) provides something contrary to the savings clause of the 1952 Act. Respondent, in quoting the provisions of Section 318 (at page 10 of respondent's reply brief) conveniently omitted the language upon which the Supreme Court relied most heavily, and which distinguishes that section from Section 330(a)(2) which is involved here; the distinguishing language of Section 318 is:

> "Notwithstanding the provisions of section 405(b) . . ."

This language is couched in express negative terms which are not to be found in Section 330(a)(2). Therefore the holding of the *Shomberg* case amounts to no more than a holding that if the Act expressly

denies the benefit of a specific provision of prior law to a petitioner, then that benefit is not available to him under a general savings clause. There is no provision of the 1952 Act which expressly denies appellants the benefits of prior law, as was the case in *Shomberg v. United States,* and therefore *Shomberg* is inapplicable here.

Appellants Tano, Elizalde and Romano contend that having earned five years service at sea, at a time when that service fulfilled the residence requirement then in effect, that fulfillment of the residence requirement is a status, condition and right in process of acquisition, and is an act, thing and matter which was done and is existing, and therefore the prior law is applicable to it under the savings clause of the 1952 Act. Appellants Polintan, Magallanes, Martinez and Abella have also fulfilled that residence requirement if their sea time is computed according to the authorities set forth at pages 22 to 24 of appellants' opening brief. To make the bald statement (found at page 14 of respondent's reply brief) that the computation of sea time according to appellants' theory does violence to the language and purpose of the statute, is to disregard those authorities. It also ignores the facts of this case, inasmuch as the time which the latter four appellants seek to count toward the residence requirement was spent as directed by the Government shipping agency that employed them (MSTS). Similarly the statement at page 9 of respondent's reply brief that the requirements of the former section "encourage ship jumping and put a premium on illegal

entry'' is inapposite because appellants did *not* jump ship, but obediently did as they were told to do by the Government agency that employed them. It is more appropriate to say that if these appellants are denied naturalization, the clear language and purpose of these statutes will have failed, because these appellants were recruited to—and did—man the merchant ships of this country with the promise of citizenship; and they have faithfully obeyed all orders given to them.

The only reason for delay in the filing of appellants' petitions for naturalization is that they relied on the statements of employees of the Immigration Service after appellants had taken all reasonable steps at their command to insure compliance with the law.

Lastly it should be noted that respondent states at page 11 of respondent's reply brief: ''On appellants' contention there is no distinguishing reason why eligibility acquired under a still earlier statute, long since amended or repealed, should not also be considered as 'preserved' by the Savings Clause of the 1952 Act.'' Whatever the relative merits of the latter contention, the short answer to respondent's criticism of it is that appellants do not make such a contention. The more complete answer to this contention is that appellants' rights accrued under the 1940 Act; the savings clause of the 1952 Act expressly applies to statutes repealed by the 1952 Act; and Section 403(43) of the 1952 Act specifically provides for the repeal of the entire 1940 Act. Therefore appellants' eligibility under the 1940 Act was preserved by the savings clause of the 1952 Act.

CONCLUSION.

It is respectfully submitted that the decision of the District Court must be reversed and remanded with directions either to grant the petitions for naturalization or to enter sufficient findings of fact and conclusions of law.

Dated, San Francisco California,
October 1, 1956.

Respectfully submitted,
JACK L. BURNAM,
Attorney for Appellants.